

CHECKLIST FOR 8(a)(5) Allegations¹

I. All Section 8(a)(5) Cases

A. Recognition – when and how

1. Certification (Case number) or voluntary recognition
2. If construction industry, 8(f) or 9(a) relationship

B. Description of the bargaining unit, incl. approximate size (e.g. P & M unit of about 40 employees)

C. Collective-bargaining history

1. Current cba—obtain copy and determine effective dates
2. If no current cba, a copy of most recent agreement, if any, and status of negotiations

II. Refusal to Provide Information

A. Context of information request—underlying issue that gave rise to request

1. Contract negotiations
 - a) Relevant proposals (copies)
 - b) Financial information in response to employer claim of inability to pay—details of bargaining table discussions/proposals and employer's claim (bargaining notes)
2. Contract administration, enforcement or grievances (copies)
3. Negotiations over proposed change in terms and conditions of employment
4. General unit information after initial recognition/certification
5. Miscellaneous (e.g., subcontracting unit work, alter egos/double-breasted operations)

B. Information request

1. Who made to whom—agency status of each
2. When, where and circumstances
3. Form

¹

This checklist is intended as an aid to identify some key areas to cover in an affidavit and is *not* a comprehensive list of questions or issues. Other areas to include in the affidavit will be determined by legal research and by responses to the items in the checklist.

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- a) Copies of written or e-mail requests
- b) If oral, identity of corroborating witnesses, copies of bargaining notes, copies of subsequent written confirmation or correspondence
- 4. Nature of information requested—e.g., documentary or non-documentary, class-wide summary or employee-by-employee, time periods
- 5. Relevance of each item requested—presumptively/non-presumptively relevant
- 6. Explanation of relevance given to employer, if any, of each item requested

C. Response to request

- 1. When and by whom
- 2. Oral (notes) or written (copy)
- 3. Partial satisfaction: items provided and items refused
- 4. Defenses or objections raised by employer in response
 - a) Vague or unspecific request
 - b) Unavailable or nonexistent
 - c) Not relevant or necessary
 - d) Confidentiality
 - (1) Asserted confidentiality interest
 - (2) Discussions/negotiations over accommodation of confidentiality
 - (3) HIPAA—special rules for employee medical records
 - e) Burden, cost or difficulty of supplying (including discussions/negotiations over accommodation)
 - f) Bad faith request or improper “discovery” for ulp charge
 - g) Privilege

D. Union follow-up to employer’s response or non-response

- 1. Objections to response in writing/e-mail (copies) or orally (notes)
- 2. Renewals of request (copies/notes)
- 3. Further correspondence and discussions (copies/notes) about
 - a) Requested information

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b) Underlying issue that gave rise to information request

E. Current status of information request

1. What requested but unprovided items still needed or sought
2. What delay in providing information does the union contend was unlawful and basis for contention

F. Potential defenses/objections employer may raise in response to charge—see C4 above

G. Post Office information cases—see OM Memo 03-18 (revised)

III. Unilateral Changes

A. Policy, agreement or practice that was changed

1. Copy of policy or agreement
2. Description of practice
3. Tenure of policy/agreement/practice
4. History and consistency of prior application or enforcement

B. Change

1. When
2. Description
3. Notice of change from employer (including copies/notes)
 - a) To employees—when and how
 - b) To union—when and how
4. Factual basis for contention that notice from employer was inadequate
5. Other actual notice received—when and how

C. Impact of change on terms and conditions of employment

1. Number and identity of employees affected
2. Nature of impact
3. Financial impact on employees—i.e., potential backpay

D. Union response to notice of change

1. Protest (copies/notes)
2. Grievance
 - a) Copy of grievance and responses
 - b) Current status of grievance

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E. Discussions or bargaining about change

1. Copies/notes of correspondence, discussions or bargaining
2. Defenses raised by employer
 - a) Waiver
 - (1) Contract or other agreement
 - (2) Past practice
 - (3) Union inaction
 - b) Economic exigencies for change
 - c) Periodically recurring events requiring change
 - d) Union bad faith or lack of diligence in bargaining
 - e) Not a material change
3. Union's response to defenses raised by employer
4. Factual basis for contention that bargaining over change was inadequate

F. Potential defenses employer may raise in response to charge—see E2 above

G. Is deferral appropriate?

IV. Refusal to Execute

A. Contract negotiations

1. Participants
2. Dates conducted
3. Proposals exchanged (get copies)
4. Issues in dispute
5. Notes taken during negotiations (get copies)
6. Any ground rules for tentative and final agreements

B. The agreement

1. When was the agreement reached?
2. What is it? (specify the documents constituting the agreement – get copies)
3. Evidence of a final agreement – copy of final offer, signed tentative agreements, letters, etc.

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4. Ratification required? If so, when did that occur and what was presented for ratification?
5. Documents or statements by parties indicating there was or was not an agreement

C. The refusal to execute

1. Who made the request?
2. When was the request made?
3. Who was the request made to?
4. What was the response to the request to execute?
5. Reason given for the refusal to execute? If yes, explore to see if there is any validity

V. Surface Bargaining

A. What is Charging Party's theory of the violation (cancelled meetings, refusal to meet, predictably unacceptable proposals, etc.)?

B. Bargaining sessions

1. Number of sessions
2. Length of sessions
3. Dates of sessions
4. Participants at sessions
5. Notes taken (get copies)
6. Issues and proposals made
7. Concessions made
8. Reasons offered for rejecting charging party's proposals

C. Conduct indicating a desire to avoid agreement, such as:

1. Regressive proposals
2. Predictably unacceptable proposals such as those taking away bargaining rights (get copies of written proposals; cover explanations of reasons for proposals, amendments to the proposals, and any responses to counterproposals)
3. Cancelling sessions or ending sessions early
4. Refusal to schedule sessions
5. Failure to give bargaining representative sufficient authority

D. Unlawful conduct away-from-the-table?

VI. Withdrawal of Recognition

- A. Date of withdrawal**
- B. Method of withdrawal – if written, get copy**
- C. Number in unit at time of the withdrawal (specify basis for the number)**
- D. Basis for withdrawal**
 - 1. If signatures, what does document say (get copy)
 - 2. If verbal statements
 - a) What exactly was said
 - b) When was each statement made
 - c) Where was each statement made
 - d) Who was present when each statement was made
 - 3. If a poll, cover all circumstances including:
 - a) Advance notice of poll given to union? If so, when given and what response?
 - b) Safeguards provided?
 - (1) What was the purpose of the poll?
 - (2) Were employees told anything about reason for poll? If so, what, by whom and how (verbally or in writing)?
 - (3) Were employees given any assurances against reprisal?
 - (4) How exactly was the poll conducted? Was it by secret ballot?
 - (5) What were the other circumstances of the poll? Anything coercive? Employer engage in any ulps?
 - 4. Expiration of 8(f) contract (get copy)
 - a) Obtain evidence regarding nature of Employer's business
 - b) Does anyone contend there was a 9(a) relationship? If so, get evidence to support claim
 - c) Date of contract expiration
 - 5. Other circumstances such as change in employer's operations (merger of units, successor, relocation), inappropriate unit (one person), or change in bargaining representative (union affiliation or merger) – research issues and obtain relevant information

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- E. Evidence of employer involvement in the document or statements that provide the basis for withdrawing recognition?**
- F. Context of withdrawal of recognition – any ulps? If so, what conduct, when did it occur, which employees were aware of and impacted by the ulps?**
- G. Did the union respond with any evidence of employee support? If yes, when and how provided to Employer?**
- H. Changes made after withdrawal**

VII. Remedies

- A. Does Employer communicate with ees via e-mail or electronically?**
- B. Evidence of chill in potential 10(j) cases**